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No. 97-210

In the Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,
v.
DOW CORNING CORPORATION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's ruling that it had mandamus jurisdiction when petitioner does not seek review of one of the Sixth Circuit's alternative grounds for mandamus jurisdiction — namely, that the district court had not complied with the Sixth Circuit's mandate in a previous appeal.

2. If so, whether the Sixth Circuit correctly held — as an alternative ground for the exercise of mandamus jurisdiction — that an abstention decision could be reviewed under the All Writs Act, 28 U.S.C. § 1651, when the abstention statute, 28 U.S.C. § 1334(d), provides only that abstention decisions are "not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title."

3. Whether district courts, in exercising the power to fix trial venue provided in 28 U.S.C. § 157(b)(5), may transfer, to the district where a bankruptcy is pending, claims that are related to the bankruptcy and may affect the size of the bankruptcy estate.

RULE 29.6 STATEMENT

The Dow Chemical Company and Corning Incorporated each own 50% of Dow Corning Corporation. The following is a list of nonwholly owned subsidiaries of Dow Corning Corporation:

Dow Corning de Argentina S.A.I.C.
Dow Corning de Brazil LTDA
Dow Corning de Colombia, S.A.
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning Chile S.A.
DC STI S.A.
Dow Corning S.A.
Dow Corning Hansil, LTD
Universal Silicones and Lubricants Private, Ltd.
SIL Trade
SDC Technologies, Inc.
Hemlock Semiconductor Corporation
Dow Corning Toray Silicone Co., Ltd.
Dow Corning Foreign Sales Corporation
DC Krafft S.A.

The Dow Chemical Company has no parent company. The following is a list of nonwholly owned subsidiaries of The Dow Chemical Company:

Dow Kakoh Kabushiki Kaisha
P.T. Dow Polymers Indonesia
Petroquimica Bahia Blanca S.A.I.C.
Polisur S.A.
INCA International SpA
Chemtech Royalty Associates, L.P.
Petroquimica - Dow S.A. (Petrodow)
Radian International LLC
EDN-Estireno Do Nordeste S.A.

Mycogen Corporation
DowElanco B.V.

Corning Incorporated has no parent company. The following is a list of nonwholly owned subsidiaries of Corning Incorporated:

Corning Incorporated Foreign Sales Corporation
Corning France, S.A.
Corning Japan K.K.
Corning Asahi Corporation
Corning Asahi Video Products Company
Iwaki Corning (M) SDN BHD
Dominique Dutscher, S.A.
Siecor Corporation
Siecor Mexico S.A. de C.V.
Siecor S.A. de C.V.
EuroKera S.N.C.
Keraglass S.N.C.
Samcor Glass Limited
Sicover, S.A.
Siecor GmbH
Siecor GmbH & Co. KG
International Hau-Mei Glass Engineering Co., Ltd.
Optical Waveguides Australia Pty. Ltd.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning (U.K.) Ltd.
Shanghai Corning Engineering Corporation Ltd.
Optical Fibres
Samsung-Corning Co., Ltd.
Samsung Corning Company (Malaysia) SDN BHD
N-Cor, Ltd.
ACOR Programs, Inc.
CeraMem Separations, Inc.
Cormetech, Inc.
American Video Glass Company

Corporate Venture Partners
Samsung Corning Precision Glass Co., Ltd.
Corsam Glasstec R&D Center
Eurokera North America, Inc.
Fiber Sensys, Inc.
Molecular Simulations, Inc.
Pittsburgh Corning Corporation
U.S. Conec, Ltd.
Steuben Partners, L.P.
Quanterra Incorporated

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BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 113 F.3d 565. The opinion of the district court (Pet. App. 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1997. The petition for writ of certiorari was filed on August 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Background.

Dow Corning Corporation ("Dow Corning" or "the debtor") is a leading manufacturer of silicone industrial products. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. C.A. App. 208. In 1991, the peak year for sales of Dow Corning's breast implant products, silicone gel breast implants constituted less than 1% of Dow Corning's total sales. *Ibid.*

Studies by disinterested scientists have consistently found no connection between silicones and disease. The executive editor of *The New England Journal of Medicine* recently summarized the scientific testing as follows: "several good epidemiologic studies have failed to show an association between implants and a host of connective tissue diseases, symptoms, and abnormal lab tests. * * * The best evidence now is a relative risk of 1.0, indicating no contribution of implants to disease." Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant*

Case 195-197 (1996). Nonetheless, tens of thousands of recipients of Dow Corning's breast implants have sued in recent years, claiming to have contracted various diseases as a result of the silicones in their implants. *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) ("*Dow Corning I*"), *cert. denied*, 117 S. Ct. 718 (1997).

In thousands of these cases, the plaintiffs have sued not only Dow Corning, but also its corporate shareholders, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"), even though neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. 86 F.3d at 485-86. All of the claims against the Shareholders are brought by plaintiffs who are also asserting the same claims against the debtor, seeking recovery for the same alleged injuries resulting from the same products — the debtor's implants. Pet. App. 9a-10a; C.A. App. 1499-1605. Thus, all of the cases against the debtor and its Shareholders raise the same threshold issue — do Dow Corning's implants cause disease, as the tort claimants assert? C.A. App. 123, 1500, 1504-1605. (Some cases include claims that implants have ruptured or leaked, but those cases also allege uniformly that the implants cause disease.) Throughout this litigation, Dow Corning and its Shareholders have suggested that the federal courts keep open the option of eventually holding a single trial to resolve this common, potentially dispositive, question. *E.g.*, C.A. App. 214-22, 861-73, 883-87, 895-96.

For many years, Dow Corning shared insurance coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. As the court of appeals has noted, Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate"; the policies have total aggregate coverage limits of more than $1 billion. *Dow Corning I*, 86 F.3d at 494.

In addition, the court of appeals has held that if the claims against Dow Chemical and Corning proceed "'separately,'" the pool of joint insurance available to the debtor may be "'significantly reduce[d].'" Pet. App. 11a (quoting *Dow Corning I*, 86 F.3d at 495). This could occur because settlements or judgments paid by the Shareholders, or defense expenses incurred by the Shareholders in "litigating thousands of breast-implant claims in innumerable jurisdictions," Pet. App. 12a, may be reimbursed by joint insurance proceeds that would otherwise be part of the debtor's estate. *Dow Corning I*, 86 F.3d at 495.

B. The Proceedings Below.

1. The first appeal. Shortly after its Chapter 11 filing, Dow Corning moved under 28 U.S.C. § 157(b)(5) to transfer to the Eastern District of Michigan, where its bankruptcy case is pending, all pending breast implant claims involving Dow Corning implants — that is, all of the claims against Dow Corning and its Shareholders. Pet. App. 5a. In September 1995, the district court granted the transfer motion as to the claims against the debtor, but refused to transfer the claims against the Shareholders, ruling that the latter claims were not "related to" the debtor's bankruptcy case and thus not subject to the district court's jurisdiction under 28 U.S.C. § 1334(b). *In re Dow Corning Corp.*, 187 B.R. 919 (E.D. Mich. 1995).

In April 1996, the Sixth Circuit reversed the district court's refusal to transfer the claims against the Shareholders. First, the court of appeals held that those claims were "related to" Dow Corning's bankruptcy within the meaning of § 1334(b). *Dow Corning I*, 86 F.3d at 490-95. Second, the court held that district courts have the power, under 28 U.S.C. § 157(b)(5), to fix trial venue for claims "related to" the bankruptcy in the district where the bankruptcy is

pending. *Id.* at 495-97.[1] Finally, noting that "a Section 157(b)(5) motion 'requires an abstention analysis,'" the Sixth Circuit remanded for further proceedings, "for the district court to 'determine *in each individual case* whether hearing it would promote or impair efficient and fair adjudication'" of the bankruptcy case. 86 F.3d at 497 (emphasis added).

2. The second appeal. On remand, the district court again declined to transfer the claims against the Shareholders, this time on the ground that it would abstain from hearing those claims. Pet. App. 13a-20a. In so ruling, the district court did not consider the claims on an individual basis. Rather, the court ruled on abstention *en masse*, holding that all of the claims against the Shareholders were subject to mandatory abstention and that it would also exercise its discretion to abstain as to all of the claims. *Ibid.*

The Sixth Circuit again overturned the district court's decision, ruling that the district court's ruling was "fraught with clear error"; that its reasoning was, "in generous terms, inadequate," "troubling," and made "little practical sense"; and that the district court had, in several respects, "ignored" the Sixth Circuit's prior ruling. Pet. App. 8a-11a.

The court of appeals held "for two reasons that we have jurisdiction in mandamus to review the district court's

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[1] In so holding, the Sixth Circuit followed the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), another mass tort case. In *Robins*, the Fourth Circuit held that claims related to a bankruptcy case could be centralized in one forum under § 157(b)(5); this provided an opportunity to adopt a "mechanism for dispute resolution" that would obviate the need for "innumerable trials, stretching over an interminable time" and would avoid the "stupendous costs that would be involved if all the claims here had to be tried." 788 F.2d at 1013 (quoted at 86 F.3d at 496).

decision." Pet. App. 6a. First, the court explained, "this is not the ordinary situation" involving an abstention decision. *Ibid.* Rather, the Sixth Circuit in *Dow Corning I* "instructed" the district court "to undertake a case-by-case review" of each tort claim and determine, "as to each case, whether to abstain." *Id.* at 6a-7a. The district court, however, "completely disregard[ed]" that instruction and instead issued "blanket determination[s]" that abstention was appropriate. *Id.* at 8a. Since the district court "did not comply with our order of remand," the court of appeals concluded that it was "necessary and appropriate" to issue a writ of mandamus "to require the district court to conduct the abstention analysis in strict compliance with the requirements of § 1334 and our order of remand."[2] *Id.* at 7a.

The court of appeals also provided a "[s]econd," alternative ground for the exercise of mandamus jurisdiction. Pet. App. 7a. The court held that § 1334(d) — which provides that abstention decisions are "not reviewable by appeal or otherwise * * * under section 158(d), 1291, or 1292 of this title" — did not preclude its ability to review abstention decisions "pursuant to our mandamus authority

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[2] The court of appeals further explained that case-by-case abstention decisions were necessary "because of the paucity of evidence on the record" supporting abstention on a global basis. Pet. App. 9a. In "many" cases, the court noted, "there does not even appear to have been a motion for abstention filed by the plaintiff," and "[i]t is undisputed that some of the cases do not meet the requirements of mandatory abstention." *Id.* As for discretionary abstention, the district court "overlooked the risks to Dow Corning's estate that were clearly articulated in our prior decision" and, in particular, "ignored this Court's examination of the evidence [concerning the joint insurance] and made a conclusory finding to the contrary" — "without a hearing or the presentation of additional evidence." *Id.* at 10a-11a.

under 28 U.S.C. § 1651," since § 1334(d) "does not mention" § 1651. Pet. App. 7a.

REASONS FOR DENYING THE PETITION

The questions presented in the petition clearly do not warrant this Court's review. Petitioner's first question — whether § 1334(d) prohibits mandamus review under § 1651 — is purely academic. The court of appeals articulated *another* ground for mandamus jurisdiction — the district court's failure to comply with the Sixth Circuit's previous mandate — that petitioner does not even ask this Court to review (and which is obviously case-specific, presents no question of general importance, and is plainly correct in any event). Thus, a decision by this Court disagreeing with the Sixth Circuit's construction of § 1334(d) would have no effect on the judgment of the court of appeals.

Even if resolution of the § 1334(d) question could change the outcome of this case, there is no circuit conflict on the issue whether that statute prohibits review by mandamus, and the Sixth Circuit's decision is fully consistent with this Court's precedent and the settled canons of statutory construction. Nor are the circuits divided on whether a district court has the authority, in setting trial venue under 28 U.S.C. § 157(b)(5), to transfer cases within the district court's "related to" bankruptcy jurisdiction to the district where the bankruptcy is pending for trial. Indeed, in accordance with the plain language of the statute, the circuits have uniformly upheld the power to order such transfers in appropriate cases. See, *e.g.*, *Robins*, 788 F.2d at 1010.

In short, there are no "compelling reasons," Rule 10, for reviewing the questions presented by the petitioner. Not only is there no conflict among the courts of appeals, but a decision by this Court on petitioner's principal ground for review would not change the result below. Accordingly, there is no basis for granting the petition.

I. REVIEW OF THE § 1334(d) QUESTION IS UNWARRANTED.

A. A Ruling By This Court Will Have No Effect On The Decision Below Since Petitioner Does Not Seek Review Of The Sixth Circuit's Alternative Basis For Jurisdiction.

The first argument in the petition — that this Court should review the Sixth Circuit's ruling on whether § 1334(d) permits mandamus review of abstention decisions — is simply inexplicable. As noted above, the Sixth Circuit's principal basis for mandamus jurisdiction was not § 1334(d), but that the district court, on remand, failed to comply with the Sixth Circuit's mandate in *Dow Corning I*. Petitioner asserts briefly that this holding is "untenable" (Pet. 9-10), but it does not ask this Court to review this alternative holding by the court of appeals. That being the case, there is no reason for the Court to consider the Sixth Circuit's *other* rationale for exercising mandamus jurisdiction. This Court typically does not decide questions that would not alter the result in the court below. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 173 (7th ed. 1993).

Even if petitioner had sought review of the Sixth Circuit's conclusion that the district court failed to comply with the appellate court's earlier mandate, that question would not come close to satisfying the stringent standards required for this Court to grant certiorari. This ruling by the court of appeals is no more than an application, to the particular facts of this case, of the well-settled rule that an appellate court may issue a writ of mandamus "if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning.'" *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978) (quoting *United States v.*

Fossatt, 62 U.S. (21 How.) 445, 446 (1859)). See also, *e.g.*, *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) ("if a lower court 'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled * * * by a writ of mandamus'"). And while this Court is not foreclosed from reviewing the court of appeals' interpretation of the scope of its mandate, the Court consistently has "recognized that 'the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes.'" *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)); see also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965) ("Obviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate").

Here, the Sixth Circuit's previous directions were unequivocal. In *Dow Corning I*, the court of appeals explicitly instructed the district court that in conducting its "'abstention analysis'" on remand, it had "to 'determine *in each individual case* whether hearing it would promote or impair efficient and fair adjudication'" of the debtor's bankruptcy case. 86 F.3d at 497 (emphasis added). The district court disregarded that instruction, deciding abstention on a *global* basis rather than conducting "the necessary case-by-case inquiry" mandated by the Sixth Circuit's prior opinion. Pet. App. 9a. The district court also "ignored" key evidentiary conclusions settled by the Sixth Circuit in the first appeal and made "contrary" findings "without a hearing or the presentation of additional evidence." *Id.* at 11a. Accordingly, even if petitioners had sought certiorari on the question, there would have been no cause for this Court to

review the plainly correct judgment of the court of appeals that its mandate had been disobeyed.

In these circumstances, the Sixth Circuit was not required to sit by helplessly while the district court disobeyed its instructions and ignored its conclusions. Quite the contrary — a court of appeals unquestionably has the "power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose." *Delaware, L. & W. R. Co. v. Rellstab*, 276 U.S. 1, 5 (1928) (Holmes, J.). And it possessed the discretion "to issue mandamus to protect [its] mandate" even assuming *arguendo* that the district court's abstention decision would not otherwise be reviewable. *United States v. United States Dist. Ct.*, 334 U.S. 258, 264 (1948) (holding that the Second Circuit had the power to issue a writ of mandamus to enforce its prior mandate, even assuming that it would have no jurisdiction over future appeals in the case). "[T]he fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate." *Id.* at 263. Thus, an appellate court may issue a writ of mandamus in order to "protect[ ] a past exercise of jurisdiction," even though the court may "have nothing to do with any other appeals in the case." *Id.* at 264. "The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it," not whether the court of appeals will have jurisdiction over future appeals. *Id.* at 265.

All of this has long been settled. When this is coupled with petitioner's failure to seek review of the Sixth Circuit's particular application of this rule, it is evident that there is no basis for this Court to review the Sixth Circuit's conclusion that it had jurisdiction to issue a writ of mandamus in this case.

B. In Any Event, The Sixth Circuit's Construction Of § 1334(d) Is Correct And Is Fully Consistent With Prior Precedent.

Even if there were not an independent ground for the Sixth Circuit to exercise mandamus jurisdiction, that court's construction of § 1334(d) is clearly correct under established rules of statutory construction. Moreover, the Sixth Circuit's decision on this issue does not conflict with the holdings of any other courts of appeals.

The starting point in construing any statute is, of course, "the language of the statute itself." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). Section 1334(d) provides that abstention orders are "not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title." This means precisely what it says: parties may not seek review of a district court's abstention rulings under sections 158(d), 1291, or 1292. The statute plainly does not, however, bar review under § 1651; that provision is conspicuously absent from the list of provisions contained in § 1334(d). In interpreting a statute, "[o]ne must * * * listen attentively to what it does *not* say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) (emphasis added).[3]

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[3] *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995), does not shed any light on whether mandamus review is barred by the language of § 1334(d), because that was not a mandamus case and thus the Court had no cause to consider the significance of the omission of § 1651 from the statutory enumeration. The defendant in that case filed an appeal from the district court's remand order, not a mandamus petition. See *id.* at 496.

This reading of § 1334(d) is supported by the doctrine of *expressio unius est exclusio alterius*. Under this long-established canon of construction, the references to particular statutory provisions in § 1334(d) must be read to exclude others, including § 1651. See, *e.g.*, *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993) (a heightened pleading standard is not required for *Monell* actions, because while Fed. R. Civ. P. 9(b) requires "greater particularity in pleading certain actions," it "do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983"); *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997) (chapter 153 of the Antiterrorism Act does not apply to pending cases because the statute provides only that chapter 154 of the act applies to pending cases); *Felker v. Turpin*, 116 S. Ct. 2333, 2341 (1996) (Stevens, J., concurring) (noting that the section of the Antiterrorism Act providing that certain orders "shall not be appealable and shall not be the subject of a petition for * * * writ of certiorari" does not "purport to limit our jurisdiction * * * under the All Writs Act, 28 U.S.C. § 1651"). As the Ninth Circuit concluded in an analogous case, "[i]t would be an odd use of language" for a statute to list certain sections of the U.S. Code "if the references to particular sections were not meant to exclude others." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Ibid.*

Congress knew full well how to foreclose mandamus as an avenue for seeking appellate review, had it wanted to do so. Most strikingly, 28 U.S.C. § 1447(d), the statute involved in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), provides unequivocally that certain remand

orders are "not reviewable on appeal or otherwise" — without qualifying that language by listing only certain statutory provisions, as in § 1334(d). Thus, not only is it unquestionably false to state that those two statutes have "identical language" (Pet. 8), but the absence in § 1334(d) of a blanket prohibition on appellate review like that found in § 1447(d) is a compelling indication that Congress intended that § 1334(d) be less sweeping in effect. See *Patterson v. Shumate*, 504 U.S. 753, 758 (1992); *Potter v. United States*, 155 U.S. 438, 446 (1894) (noting that the word "wilful" used to describe certain offenses but not others in same statute "cannot be regarded as mere surplusage; it means something").

Petitioner's interpretation of § 1334(d) reads the enumerated sections right out of the statute. If petitioner were correct that Congress intended only to clarify that "abstention decisions in the bankruptcy court may be reviewed in the district court" alone (Pet. 11), it could simply have stated that decisions under § 1334(c)(2) are not reviewable by the courts of appeals — period. There certainly would not have been any need to go on and list §§ 158(d), 1291, and 1292, each of which is a means to obtain review by the court of appeals, unless the intention was to limit the breadth of § 1334(d) with respect to the courts of appeals, so that the bar on appellate review applied only to certain routes of review.[4] Congress would not have recited some (but not all) of the possible bases for obtaining appel-

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[4] In light of the specific statutory references in § 1334(d), the last two words in the "appeal *or otherwise*" phrase in that statute cover not mandamus (since § 1651 is not listed), but 28 U.S.C. § 1292(b). Appellate review under that statute is discretionary; a party seeking to invoke § 1292(b) must file an "application" for leave to appeal with the court of appeals, not a notice of appeal.

late jurisdiction if it had intended to prevent a court of appeals from reviewing abstention decisions in every single circumstance. The inclusion of those specific sections of Title 28 would be mere surplusage under petitioner's theory, and this Court has stated repeatedly that it will not construe a statute so that part of the statute is rendered meaningless. See, *e.g.*, *Walters v. Metropolitan Educ. Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' * * * rather than to emasculate an entire section, as the [petitioner's] interpretation requires").

Petitioner attempts to override the plain statutory language with a lengthy quotation from the legislative history of § 1334(d). Pet. 11-12. But the quoted passage is not even close to being "'clear contrary evidence of legislative intent'" (Pet. 10); indeed, it says nothing at all about the reasons why Congress chose, in § 1334(d), to list only certain provisions in Title 28 and not § 1651. And the notion that particular language used by Congress in drafting a statute — here, the enumeration of certain sections of the United States Code — is rendered insignificant by silence in the legislative history turns settled rules of statutory construction upside down. Plain language trumps legislative history, not the other way around, *Ron Pair Enterprises*, 489 U.S. at 241; *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), and all the more so when the legislative history cited does not say a word about the language in dispute.

Thus, the Sixth Circuit's decision is fully consistent with established rules of statutory interpretation. And petitioner

does not (and could not) argue that there is any split in the circuits on the construction of § 1334(d).[5/] Accordingly, even if the Sixth Circuit did not have an alternative basis for mandamus jurisdiction, the first question presented in the petition does not warrant this Court's review.

II. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The second question presented by petitioner concerns a district court's ability to transfer claims that affect a bankruptcy case: petitioner contends that district courts have *no* power under 28 U.S.C. § 157(b)(5) to transfer *any* claims that are within the district court's "related to" bankruptcy jurisdiction, 28 U.S.C § 1334(b). Pet. 13-17. In other words, petitioner's theory is that even if it is indisputable that claims against non-debtors will have an effect on a bankruptcy case — say, by dissipating joint insurance proceeds that would otherwise be available to the estate — a district court would have no authority to transfer such cases to the district in which the bankruptcy was pending. Rather, a district court would have the power to transfer *only* claims asserted directly against the debtor.

1. No court has ever adopted such an extreme limitation on the power to transfer, which would deprive courts of the opportunity in mass tort litigation (and in other bankruptcy cases) to achieve a prompt, fair, and complete

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5 At one point (Pet. 9), petitioner quotes a passing statement in *In re United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997), but that court's observation, concerning 28 U.S.C. § 1452(b), is clearly dicta. Moreover, that decision does not take into account Congress's decision to limit the scope of the statute by barring review only under certain provisions in Title 28.

resolution of all claims that are related to a bankruptcy.[6] Moreover, there is no disagreement among the courts of appeals on the question of statutory construction posited by petitioner. The only other circuit to address the issue presented here — whether personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5) when those claims are not against the debtor — agrees with the Sixth Circuit. In *Robins*, the Fourth Circuit answered that question in the affirmative, reaching the same conclusion as that reached by the Sixth Circuit here. See 788 F.2d at 1010 (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all the Dalkon Shield cases").[7]

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[6] Petitioner cites *In re United States Lines*, 128 B.R. 339 (S.D.N.Y. 1991), for the proposition that § 157(b)(5) is not a venue-setting provision for claims that are related to a bankruptcy (Pet. 14-15), but that case involved only claims against the debtor, not "related to" claims. And the only holding in that case was that claims pending in state court could not be transferred to federal court under § 157(b)(5) — a ruling that is no longer good law, having been rejected by the Second Circuit. See *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court).

[7] Petitioner's contention that the *Robins* court did not order the transfer of claims against non-debtors (Pet. 16) is meritless. The Fourth Circuit unequivocally upheld the district court's authority to order the transfer to the Eastern District of Virginia of "*all actions related to* the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998 (emphasis added).

2. Petitioner's argument that § 157(b)(5) is limited to claims "against the debtor" (Pet. 14) is also contrary to the plain language of the statute. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5); rather, the statute grants district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims" generally. Nor is there anything to the argument that because Congress referred *elsewhere* in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the district court's powers under § 157(b)(5). See Pet. 15 (quoting § 157(b)(2)(B)). Precisely the opposite is true — Congress's decision to qualify personal injury claims in one section but not in another demonstrates clearly that "Congress, *when it desired to do so*, knew how to restrict the scope of" personal injury claims. *Patterson*, 504 U.S. at 758 (emphasis added). Congress's use of a "broader phrase" in § 157(b)(5) than in § 157(b)(2)(B) "strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[ ]." *Ibid.*

3. The purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization. *Dow Corning I*, 86 F.3d at 496; *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991); *Robins*, 788 F.2d at 1011. As the court of appeals recognized, the statute gives district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which would inevitably harm the reorganization process.[8] *Dow Corning I*, 86 F.3d at 496-97. Indeed, if

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[8] Centralization is particularly important with regard to the Shareholders because, wholly apart from the effect of separate

(continued...)

the transfer of "related to" claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can *do* something if the cases *are* related, like ordering a transfer.

* * *

The Sixth Circuit's refusal to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending is fully supported by precedent, logic, and the language of § 157(b)(5). There is no reason for this Court to grant review on the second question presented in the petition.

(...continued)
litigation on the debtor's interest on the joint insurance, "[t]he claims against the shareholders arise from an identical set of facts and are merely duplicates of those against Dow Corning," which have "already been transferred to the Eastern District of Michigan." Pet. App. 9a-10a. As the court of appeals recognized, requiring plaintiffs seeking compensation for one injury to litigate the same issues on two fronts — as part of the bankruptcy process *and* in state court — would serve only to "expand[ ] an already overwhelming litigation burden." *Id.* at 10a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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